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ALEXANDER L. STEVAS,
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CASE NO. 82-6370

IN THE

SUPREME COURT OF THE UNITED STATES

BENITO MARRERO,

Petitioner,

vs.

LOUIE L. WAINWRIGHT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI IN THE ELEVENTH CIRCUIT COURT OF APPEALS

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is styled Marrero v. Wainwright, Case No. 81-6038. The decision of the circuit court is contained in an unpublished opinion dated October 7, 1982.

STATEMENT OF THE CASE AND FACTS

Petitioner, Benito Marrero was convicted on Nobember 20, 1975 in the Sixth Judicial Circuit in and for Pasco County, Florida of twelve counts of burglary and twelve grand thefts. He was sentenced to the statutory maximum on each count with each sentence to run consecutive. A direct appeal was taken to the Second District Court of Appeals, State of Florida. The Second District per curiam affirmed.

On September 4, 1979, petitioner filed a motion pursuant to Fla.R.Crim.P. 3.850 to vacate, set aside or correct the sentence. The motion was denied on September 20, 1979. The denial of the 3.850 was upheld by the Second District on December 21, 1979.

Petitioner next filed a Petition for Writ of Habeas Corpus in the United States District Court for the Middle District of Florida. After submission of memoranda the Magistrate filed a report and recommendation recommending relief be denied. Objections to the report and recommendation were duly filed. On July 9, 1981 the district judge entered an Order denying habeas relief. A notice of appeal was filed, and the district judge issued a certificate of probable cause. The United States Court of Appeals for the Eleventh Circuit affirmed the District Court's denial of habeas relief. The Petition for Writ of Certiorari in this Court followed.

Petitioner was charged in three separate informations with burglary of twelve motel rooms and grand theft of a television from each room. After his arrest petitioner made certain statements to the police. A motion to suppress was filed allegin; the

statements were not freely and voluntarily made. A hearing was held on the motion and Deputies Mock, Cavanaugh and Page testified. They indicated petitioner had been given his Miranda rights on at least four occasions. Petitioner signed a waiver of attorney form. The officers also stated appellant was jovial and did not appear under the influence of drugs or alcohol.

Further testimony revealed the officers made no promises to petitioner nor was petitioner threatened. Petitioner acknowledged he had not been threatened or coerced. Petitioner took the stand and testified, in essence, that he made the statements because the officers indicated they would release his girlfriend. As assistant state attorney testified petitioner broached the subject of his girlfriend after his statements had been made.

The jury returned verdicts of guilty against petitioner for twelve separate counts of burglary and twelve separate counts of grand theft. The trial court sentenced him to the maximum punishment on each count and ran each sentence consecutive.

ARGUMENT

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The Petition for Writ of Certiorari raises the following two (2) issues:

1. WHETHER APPELLANT'S MAXIMUM CONSECUTIVE SENTENCES IMPOSED FOR TWENTY FOUR SEPARATE OFFENSES CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT

2. WHETHER THE DISTRICT COURT ERRED IN NOT HOLDING AN EVIDENTIARY HEARING ON THE VOLUNTARINESS OF APPELLANT'S CONFESSTION

This petition should be denied since previous ruling of this Court are dispositive of these issues, and there is nothing in the facts of this case which would warrant revisitation of this Court's prior decisions.

In Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L. Ed.2d 382 (1980) and Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980) this Court disposed of petitioner's claim of cruel and unusual punishment. Petitioner consistently argued his sentences were violative of the Eighth Amendment because he was given the maximum penalties, all to run consecutive, and his crimes were not violent. The defendant in Rummell upon his third felony conviction was given a life sentence pursuant to a Texas recidivist statute. His conviction had been for fraudulent use of a credit card to obtain $80.00, passing a $26.36 forged check and use of false pretences to obtain $120.75. Rummell argued his sentence was cruel and unusual because it was disproportionate to the crime, and there was an absence of violence in his crimes. Both arguments were rejected.

In rejecting Rummell's disproportionality argument, the Court noted the length of the sentence for a particular felony is a matter of legislative prerogative. In Whalen v. United States, supra., the Court held consecutive sentences is likewise a matter of legislative prerogative. Appellant was sentenced to the maximum term of imprisonment on the burglaries and grand thefts. Generally, our Courts have held sentences not violative of the

Eighth Amendment where they did not exceed the statutory maximum. See Strader v. Blalock, 405 F.Supp. 1155 (D.C.W.D., Va., 1975); Bonner v. Henderson, 517 F.2d 135 (5th Cir. 1975) and United States v. Moss, 631 F.2d 105 (8th Cir. 1980). In Moss the defendant was convicted of multiple counts of mail fraud. He was given a 25-year sentence. Moss' argument on appeal was virtually identical to this appellant's. He urged the Court abused its discretion by imposing consecutive sentences, and the sentence was disproportinate to the crime. It must be noted that the 12 mail/wire fraud offenses arose out of a single scheme.

Sub judice, petitioner's sentences were within the range set by the legislature for the particular crimes. And the trial judge exercised his discretion and ran the sentences consecutively. These factors do not present a federal constitutional question.

Respondent also submits Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963) and Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) are dispositive of petitioner's Fifth Amendment claim. Petitioner questioned the voluntariness of his statement to the police. A pre-trial motion to suppress was filed, and a hearing was held on that motion. Both parties were represented, and testimony was taken, including testimony from petitioner. The factual dispute concerning voluntariness was fully and fairly litigated. The trial court made findings, and the determination based on them is supported by the record. Townsend v. Sain and Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981).

The petitioner argues his claim of having a drug problem was not adequately developed in state court. At the suppression hearing petitioner had an opportunity to present any evidence or testimony he had touching on the issue of voluntariness, including drug use. Cf. Stone v. Powell, supra. Marrero testified himself and never stated anything about drugs. See Appendix D.

CONCLUSION

The Petition for Writ of Certiorari should be denied since petitioner's rights under the Eighth and Fifth Amendments have not be abridged.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Donald S. Cammas, Esq. 5200 W. Kennedy Blvd, Post Office Box 24317, Tampa, Florida on this 20th day of May, 1983.

Of Counsel for Respondent

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